

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	NOS. CR-06-0101-LRS
Respondent,)	(CV-07-0229-LRS)
)	
-vs-)	
)	ORDER DENYING 28 U.S.C. §2255
JOSE DORANTES-CORREA,)	MOTION
)	
Petitioner.)	

Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed July 17, 2007¹ (Ct. Rec. 26, CR-06-0101-LRS, Ct. Rec. 1, CV-07-0229-LRS). The Motion is submitted by Jose Dorantes-Correa, who is appearing *pro se* for the purposes of these proceedings.

I. BACKGROUND

Mr. Dorantes-Correa was indicted on October 3, 2006 for Alien in the United States After Deportation in violation of 8 U.S.C. §1326. Mr. Dorantes-Correa pleaded guilty to Count One of the Indictment on November 15, 2006 with a written Fast Track plea agreement. Ct. Rec. 21. On that same day, November 15, 2006, Mr. Dorantes-Correa was sentenced to a 33-month term of imprisonment with three years

¹Petitioner filed what appears to be his memorandum in support of his motion on July 24, 2007. Ct. Rec. 27 in CR-06-0101-LRS.

1 supervised release; and a special assessment of \$100. Mr. Dorantes-
2 Correa contends that his sentence is unconstitutional based on one
3 ground: that the "felony" and "aggravated felony" provisions found at
4 8 U.S.C. 1326(b)(1) and (2) are unconstitutional on their face and as
5 applied to his case. Ct. Rec. 27 in CR-06-0101-LRS, at 1. Petitioner,
6 however, acknowledges that existing Supreme Court precedent, *Apprendi*
7 *v. New Jersey*, 530 U.S. 466 (2000) forecloses his argument but he
8 raises the same to preserve such arguments for possible further
9 review. Ct. Rec. 27 in CR-06-0101-LRS, at 1.

10 Petitioner also appears to be seeking relief based on his status
11 as an alien under the equal protection and due process clauses of the
12 Constitution. Ct. Rec. 26 CR-06-0101-LRS, at 2-3. Petitioner
13 appears to argue that an alien is deprived of his benefits or
14 privileges and treated more harshly than a United States citizen at
15 sentencing. Petitioner requests a 2-point downward departure if he
16 accepts a final deportation order. Ct. Rec. 26 in CR-06-0101-LRS at
17 1.

18 II. DISCUSSION

19 28 U.S.C. § 2255 provides, in part:

20 A prisoner in custody under sentence of a court
21 established by Act of Congress claiming the right to
22 be released upon the ground that the sentence was
23 imposed in violation of the Constitution or laws of
24 the United States, or that the court was without
25 jurisdiction to impose such sentence, or that the
26 sentence was in excess of the maximum authorized by
law, or is otherwise subject to collateral attack, may
move the court which imposed the sentence to vacate,
set aside or correct the sentence.

1 A petitioner is entitled to an evidentiary hearing on the motion
2 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and
3 the files and records of the case conclusively show that the prisoner
4 is entitled to no relief. This inquiry necessitates a twofold
5 analysis: (1) whether the petitioner's allegations specifically
6 delineate the factual basis of his claim; and, (2) even where the
7 allegations are specific, whether the records, files and affidavits
8 are conclusive against the petitioner. *United States v. Taylor*, 648
9 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal
10 quotations, citations and footnote omitted).

11 This Court has reviewed the record and, for the reasons set forth
12 more fully below, concludes Petitioner is not entitled to an
13 evidentiary hearing. A habeas corpus petitioner is entitled to an
14 evidentiary hearing in federal court if he alleges facts which, if
15 proven, would entitle him to habeas corpus relief. *Smith v.*
16 *Singletary*, 170 F.3d 1051, 1053-54 (11th Cir. 1999) (citation
17 omitted); *Cave v. Singletary*, 971 F.2d 1513, 1516 (11th Cir. 1992)
18 (citing *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770
19 (1963)). Here, the pertinent facts of the case are fully developed in
20 the record before the Court. *Smith*, 170 F.3d at 1054 (stating that a
21 district court does not need to conduct an evidentiary hearing "if it
22 can be conclusively determined from the record that the petitioner was
23 not denied effective assistance of counsel"). No evidentiary
24 proceedings are required in this Court. *High v. Head*, 209 F.3d 1257,
25 1263 (11th Cir. 2000) (citing *McCleskey v. Zant*, 499 U.S. 467, 494,
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1 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991)), *cert. denied*, 532 U.S.
2 909, 121 S. Ct. 1237, 149 L. Ed. 2d 145 (2001).

3 Further, the statute provides that only if the motion, file, and
4 records "conclusively show that the movant is entitled to no relief"
5 may the Court summarily dismiss the Motion without sending it to the
6 United States Attorney for response. 28 U.S.C. § 2255. The Rules
7 regarding section 2255 proceedings similarly state that the Court may
8 summarily order dismissal of a § 2255 motion without service upon the
9 United States Attorney only "if it plainly appears from the face of
10 the motion and any annexed exhibits and the prior proceedings in the
11 case that the movant is not entitled to relief in the district court."
12 Rule 4(a), RULES-SECTION 2255 PROCEEDINGS. Thus, when a movant fails to
13 state a claim upon which relief can be granted or when the motion is
14 incredible or patently frivolous, the district court may summarily
15 dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917
16 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir.
17 1985).

18 **A. APPRENDI CHALLENGE TO SENTENCE-ENHANCING FINDINGS**

19 If the Court is deciphering Mr. Dorantes-Correa's argument
20 correctly, he argues that the +16 level enhancement applied to him for
21 sentencing purposes violated *Apprendi*'s holding that "[o]ther than the
22 fact of a prior conviction, any fact that increases the penalty for a
23 crime beyond the prescribed statutory maximum must be submitted to a
24 jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*,
25 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The
26 Court finds that the Petitioner has not provided any evidence or law

1 to convince this Court that his constitutional rights were violated.
2 *Apprendi* is still good law and the Court can consider Petitioner's
3 prior conviction to qualify as a felony drug offense for sentencing
4 purposes. See *U.S. v. Hollis*, 490 F.3d 1149 (9th Cir. 2007). It is
5 noted that pursuant to the Fast Track Plea Agreement, the parties
6 agreed to the criminal history calculations contained in the
7 abbreviated presentence report. See Plea Agreement, ¶7(b).

8 **B. EQUAL PROTECTION - ALIEN STATUS**

9 ***The Court finds no merit to Petitioner's conclusory statement***
10 that he is treated harsher than a U.S. citizen based on his alien
11 status, which amounts to an equal protection violation. Petitioner
12 provides no evidence of such a violation.

13 **C. PLEA AGREEMENT (FAST TRACK U.S.S.G. § 5K3.1)**

14 On November 16, 2007 the Court found that Petitioner had
15 voluntarily entered into the Fast Track Plea Agreement with the United
16 States. Paragraph 14 of the Plea Agreement states that both parties
17 to the agreement waive any right to appeal the conviction and the
18 sentence imposed by the Court. Defendant also waived any right to
19 collaterally attack the conviction and sentence under 28 U.S.C. §2255
20 or any other collateral attack, except for ineffective assistance of
21 counsel based on facts discovered after the plea and sentencing. The
22 agreement further states that this waiver will result in the dismissal
23 of any appeal.

24 The Petitioner is not entitled to an evidentiary hearing on the
25 motion to vacate his sentence under 28 U.S.C. § 2255. The Court
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1 summarily dismisses the Motion without sending it to the United States
2 Attorney for response. Accordingly,

3 **IT IS ORDERED** that:

4 1. Mr. Dorantes-Correa's Motion to Vacate, Set Aside, or Correct
5 Sentence by a Person in Federal Custody, filed July 17, 2006 (**Ct. Rec.**
6 **26**, CR-06-0101-LRS, **Ct. Rec. 1**, CV-07-0229-LRS) is **DENIED**.

7 2. The District Court Executive is directed to:

8 (a) File this Order;

9 (b) Provide a copy to Petitioner **AND TO** the United States
10 Attorney, Spokane, Washington; and

11 (c) **CLOSE THESE FILES**.

12 **DATED** this 27th day of September, 2007.

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14 ***s/Lonny R. Suko***

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16 LONNY R. SUKO
17 UNITED STATES DISTRICT JUDGE
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